

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	
and	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the	)	
Telecommunications Act of 1996	)	

**SEPARATE REPLY COMMENTS OF THE  
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

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## **SUMMARY**

In its comments, CompTel urged the Commission to apply the “collocation throughput” approach when interpreting the phrase “necessary for interconnection or access to unbundled network elements” set forth in section 251(c)(6) of the Act. CompTel demonstrated that cross-connects as well as certain types of multi-function equipment are necessary using this approach. As expected, most of the incumbent local exchange carriers (“ILECs”) have opposed cross-connects and the collocation of any multi-function equipment. As many of the ILECs’ arguments already have been anticipated and, in effect, refuted in the opening comments filed by CompTel and other parties, these comments shall focus on a few specific points.

First, the comments in this proceeding justify use of CompTel’s collocation throughput approach to interpreting the term “necessary.” The comments show that CLECs must be able to collocate multi-function equipment, and to engage in CLEC-to-CLEC cross-connects in order to maximize collocation throughput. As a result, both collocation practices are “necessary” for interconnection of the incremental throughput attributable to the equipment or cross-connects.

Second, the Commission should recognize that various functionalities are necessary for interconnection. In particular, equipment that performs, among other functions, multiplexing, concentration, and/or switching functions is necessary for interconnection and access to UNEs. Absent the ability to collocate such equipment, CLECs effectively are forced to raise rates, offer service to fewer customers, or offer fewer services to customers, each of which result in reduced traffic, thus collocation throughput. Applying the collocation throughput standard to these functions demonstrates that such functions are necessary consistent with the critical limiting standard the court has imposed.

Incumbent LECs have not presented any arguments demonstrating why multi-function equipment is not necessary for interconnection. The incumbent LECs fail to recognize that the increasingly sophisticated equipment that is being developed is smaller than its predecessors and uses less power, thus resulting in less of an imposition than other types of equipment.

Third, the Commission should not seek to distinguish between single-function and multi-function equipment. Many commenters in this proceeding have demonstrated that modern telecommunications equipment essentially defies any categorization into either “single” or “multi” functional equipment. As such, the Commission should not try to determine whether certain equipment is single-function or multi-function, but instead, should enable CLECs to collocate any equipment that would permit them to take advantage of their collocation arrangement.

Fourth, CompTel supports those commenters advocating one or more broadband UNEs. The Commission should clarify that incumbent LECs must offer packet-switching as a UNE to those CLECs that are unable to collocate in a remote terminal. The Commission also should require all ILECs to offer the same broadband service that SBC has been required to offer, and to do so as a UNE combination subject to Section 251(c)(3). CompTel further supports those comments arguing that all features and functionalities of the loop must be available. Lastly, the Commission should ensure that CLECs have access to unbundled wavelengths.

## TABLE OF CONTENTS

	Page
I. COMMENTS IN THIS PROCEEDING JUSTIFY COMPTEL'S COLLOCATION THROUGHPUT APPROACH TO INTERPRETING "NECESSARY." .....	1
A. Multi-Function Equipment.....	1
1. Comments in this Proceeding Support the Use of the Collocation Throughput Approach.....	2
2. Certain Functionalities Are "Necessary" for Interconnection and Access to Unbundled Network Elements.....	5
B. The Commission Should Not Seek To Distinguish Between Single-Function and Multi-Function Equipment.....	8
C. The Collocation Throughput Approach Supports the Use of Cross-Connects. ....	9
II. COMPTEL SUPPORTS THE ADOPTION OF A BROADBAND UNE. ....	10
III. CLECS SHOULD HAVE ACCESS TO UNBUNDLED WAVELENGTHS. ....	12

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits these separate reply comments in response to the Second Notice of Proposed Rulemaking (FCC 00-297) released by the Commission in this proceeding on August 10, 2000. CompTel is participating in joint reply comments submitted today by a number of competitive local exchange carriers ("CLECs") and their industry associations. CompTel is filing these separate reply comments to present its own perspective on several issues raised in the opening comments.

**I. COMMENTS IN THIS PROCEEDING JUSTIFY COMPTTEL'S COLLOCATION THROUGHPUT APPROACH TO INTERPRETING "NECESSARY."**

**A. Multi-Function Equipment.**

In its initial comments, CompTel urged the Commission to apply a "collocation throughput" standard when interpreting the phrase "necessary for interconnection or access to unbundled network elements" as set forth in section 251(c)(6) of the Act. The collocation throughput approach recognizes, and is predicated upon, the correlation between the equipment CLECs are permitted to collocate and the volume of traffic exchanged between CLECs and

ILECs through collocation arrangements. The collocation throughput standard shows that the collocation of multi-function equipment, as well as CLEC-to-CLEC cross-connections, fully satisfies the statutory collocation standard.

As expected, the ILECs urge the Commission to throw away its previous rules supporting multi-function equipment collocation. SBC claims that any attempt “to re-impose the multi-functional equipment collocation requirement . . . would be at odds with both the court’s decision in *GTE Service Corp.* and the plain language of section 251(c)(6).”<sup>1</sup> As CompTel and many other commenters have noted in their comments,<sup>2</sup> and as the Commission itself has recognized, the court invited the Commission to re-examine the parameters of what is “necessary,” and did not prohibit the Commission from finding that multi-functional equipment is necessary for interconnection.<sup>3</sup> (Similarly, the Court remanded the issue of CLEC-to-CLEC cross-connections without precluding the FCC from re-adopting such a rule under the relevant statutory standard.) Thus, what is at issue is whether the collocation of multi-function equipment can be “necessary” for interconnection or access to unbundled network elements, and if so, the types of multi-function equipment that ILECs must allow carriers to collocate under section 251(c)(6) of the Act.

**1. Comments in this Proceeding Support the Use of the Collocation Throughput Approach.**

Under the collocation throughput approach, if the collocation of equipment with multiple functions enables a CLEC to increase the traffic exchanged with the ILEC, then such

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<sup>1</sup> SBC Comments at 8; *see also* BellSouth Comments at 3-4.

<sup>2</sup> *See, e.g.*, CompTel Comments at 8; Joint Commenters at 11-13; Comments of RCN Telecom Services, Inc. at ii.

<sup>3</sup> *See GTE Services Corp. v. FCC*, 205 F.3d 416, 424 (2000).

equipment satisfies the “necessary” standard in Section 251(c)(6). Comments in this proceeding illustrate that manufacturers are designing multi-function equipment that will serve a greater number of customers than its equipment predecessors. As one data-CLEC explains, “[b]y integrating multiple functions into newer model equipment, manufacturers are condensing the overall space required for collocation, while at the same time increasing the capacity of the equipment to enable providers to serve a larger customer base.”<sup>4</sup> CLECs are unable to realize this increased customer base, and thereby maximize collocation throughput, without the ability to collocate multi-function equipment.

Comments in this proceeding demonstrate that there are no alternatives to collocating multi-function equipment that do not sacrifice a CLEC’s market position (and collocation throughput). In particular, CLECs would have to incur substantial additional costs if they are unable to collocate multi-function equipment. These costs effectively would preclude CLECs from achieving the throughput realized from collocated multi-function equipment. To the contrary, as non-dominant carriers, CLECs would be unable to offset these additional costs, except by reducing services, narrowing the geographic scope of entry, or raising prices – all of which would reduce aggregate throughput.<sup>5</sup>

The data submitted by Cisco, a leading equipment manufacturer, demonstrates that, in some instances, a CLEC’s costs would increase by thirty-one percent (31%) if it were unable to collocate equipment with multiple functions.<sup>6</sup> To illustrate the additional costs that

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<sup>4</sup> Rhythms NetCommunications at 14.

<sup>5</sup> *See, e.g.*, AT&T Comments at 3, 21; ATG Comments at 3 (“[i]f ATG were unable to collocate this hardware in an ILEC’s central office, ATG would have to incur considerable additional expense...ATG’s ability to compete on a level playing field with ILECs would be substantially impaired”); Cisco Comments at 11 (“such a cost differential could easily make a competitive LEC non-labile as a practical, economic, and operational matter”); Comments of Focal Communications Corporation 13.

<sup>6</sup> Cisco Comments at 11.

would be incurred, Cisco examines a “smart” DSLAM with built-in quality of service (“QoS”) functions.<sup>7</sup> If a CLEC is not permitted to use the QoS functions in its collocated equipment, the only way that it could provide the required quality of service would be to purchase additional bandwidth, DSLAM ports, and power, as well as a second uplink and an additional DS3 transport circuit. Doing so would cause the CLEC to incur substantial additional costs to provide the QoS functions than it would have had to incur using collocated multi-function equipment.<sup>8</sup> As shown above and in CompTel’s comments, the result of having to offset these costs is a decrease in the CLEC’s collocation throughput.

Moreover, as the above example shows, CLECs likely would exhaust port capacity more quickly collocating less sophisticated equipment, which would require CLECs to purchase additional DSLAM ports and power, among other things, than they would have had to purchase if using multi-function equipment. Once a CLEC exhausts its port capacity, it would need to collocate still more equipment, thus using more space in the incumbent LEC’s network. Since the CLEC could have conserved space by collocating multi-function equipment, the additional piece of equipment would result in an unnecessary use of space. Thus, if incumbent LECs truly were concerned about space considerations, they would not advocate a blanket rule foreclosing the collocation of all multi-function equipment.<sup>9</sup>

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<sup>7</sup> See Cisco Comments at 9 (to meet customer demand, “a service provider must be able to guarantee a certain level of performance (or QoS) commensurate with these services for those needing certainty and reliability.”).

<sup>8</sup> See Cisco Comments at 10-11. It appears that Cisco’s example assumes that the incumbent LEC provides bandwidth on a wholesale basis to CLECs. If the particular segment for which additional bandwidth is required is optical, as an initial matter, CLECs may be prevented from purchasing the necessary bandwidth. Several incumbent LECs in this proceeding are refusing to provide access to such “unbundled wavelength” capacity. Thus, Cisco’s analysis may be a very conservative estimate of the additional costs that a CLEC would incur if it is prohibited from collocating multi-function equipment.

<sup>9</sup> Several commenters explain that multi-functional equipment requires no more space than single function equipment, and in some instances, is smaller than single function



**2. Certain Functionalities Are “Necessary” for Interconnection and Access to Unbundled Network Elements.**

Numerous parties have argued that various functionalities are necessary for interconnection and access to UNEs. CompTel agrees that each of the cited functions is necessary for interconnection, and therefore, CLECs should be able to collocate equipment containing these functions. In particular, CompTel supports the mandatory collocation of equipment that performs, among other functions, multiplexing, concentration, and/or switching functions. As discussed below, the integration of such functions will enable a CLEC to offer more services to more customers than it might otherwise be able to do.<sup>10</sup>

CompTel’s collocation throughput approach justifies the collocation of equipment containing transmission functions, including concentration and multiplexing functions. CLECs use concentration devices in the same manner as do ILECs, that is, to concentrate traffic in order to make more efficient use of network resources.<sup>11</sup> Multiplexers also enable both ILECs and CLECs to use bandwidth more efficiently.<sup>12</sup> AT&T correctly states that the only alternative to

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equipment. *See, e.g.*, Comments at Tachion Networks, Inc. at 3; Rhythms NetCommunications at 13-14. Thus, space concerns as a result of using multi-function equipment are irrelevant.

<sup>10</sup> *See, e.g.* Joint Commenters at 24-25.

<sup>11</sup> ATG Comments at Attachment 1 (Declaration of Chuck Seefloth) at para. 7 (concentration devices include next generation digital loop carriers, channel banks, and GR 303 concentration devices, among others, and listing the following examples of such devices: Lucent Anymedia Fast Shelf; Cisco 6732; Zhone Sechtor 300; Zhone BAN; and DAML).

<sup>12</sup> *See* ATG Comments at Attachment 1 (Declaration of Chuck Seefloth) at para. 7 (multiplexers are an “integral aspect of moving lower bandwidth services onto the higher bandwidth transport facilities that are necessary for the efficient use of network resources”). Even Alcatel, which largely supports the incumbent LECs’ comments, recognizes that multiplexing is a “‘necessary’ feature of electronic equipment used for interconnection or access.” Alcatel Comments at 12 (stating that “without such an equipment feature, access would be limited to voice frequency (VF) copper facilities, which, in many cases, could not adequately support POTS.”).

collocating equipment containing these transmission functions would be to deploy additional interoffice transport, which would be prohibitively expensive—not to mention antiquated—and ultimately place greater demands on the ILECs' collocation space.<sup>13</sup> Moreover, a CLEC's ability to offer certain services, such as traditional voice services, would be impaired if it were not able to perform certain transmission functions in the central office with the collocated equipment.<sup>14</sup>

CompTel's throughput approach also demonstrates the necessity of collocating equipment containing certain switching functionalities, such as remote switch modules ("RSM") and packet switches. Absent the ability to collocate equipment containing either of these switching functionalities, a CLEC's cost of providing service would increase prohibitively because, as AT&T explains, CLECs would be forced to "incur the costs of multiplexing and 'backhauling' the traffic to and from an off-site location."<sup>15</sup> These functions also enable a carrier to maximize the use of its transport capacity by minimizing the traffic that needs to be routed back to a CLEC's main switch.<sup>16</sup> As such, CLECs are able to maximize the amount of traffic—in other words, throughput—exchanged through the collocation arrangement of such switching functionalities. Without these capabilities, a CLEC would suffer a substantial loss in functionality as well as efficiency.

The additional throughput that a CLEC would realize as a result of collocating equipment with the functions described above proves that the ILECs' arguments are unfounded. Specifically, BellSouth argues, without support, that precluding CLECs from collocating multi-

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<sup>13</sup> AT&T Comments at 20-21; see also Joint Commenters at 26 (stating that CLECs would have to incur transport costs among multiple pieces of equipment if they could not collocate multi-function equipment).

<sup>14</sup> See AT&T Comments at 22.

<sup>15</sup> AT&T Comments at 26.

function equipment would not relegate them to providing a lower quality of service than that which could be provided by locating certain functions outside of the incumbent LEC premises.<sup>17</sup> BellSouth does not provide any explanation of how it would be harmed by allowing certain types of multi-function equipment to be collocated, many of which, as noted, require no more space, and in fact, take up less space, than single function equipment. As stated above, without the ability to collocate equipment with multiple functions, not only would CLECs be unable to provide the same quality and range of services,<sup>18</sup> but they also would be unable to provide services of sufficient quality to compete with the ILEC. Thus, BellSouth's position reflects an effort to interpret section 251(c)(6) for its own strategic benefit, rather than any legitimate fear that its property would be taken needlessly due to an overinclusive definition of the statutory term "necessary."

As commenters have recognized, the Commission must adopt a flexible standard; that is, one that not only applies to the present technology and equipment, but also is responsive to changes in the telecommunications marketplace and the evolution of network equipment. As Cisco affirms, "[m]anufacturers and service providers have favored multifunctional equipment precisely because it offers capabilities that are most efficiently and effectively performed as an integrated set of functions."<sup>19</sup> Without the ability to collocate state-of-the-art multi-function equipment, CLECs would be relegated to moribund or obsolete equipment, while incumbent LECs would be able to take advantage of modern equipment specifically designed with a wide range of capabilities. This would prevent CLECs from offering the same products and services

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<sup>16</sup> AT&T Comments at 27; *see also* Comments of Corecomm, Inc., Vitis Networks, Inc., and Logix, Inc. at 20-21 (stating that CLECs should be permitted to collocate equipment that contains, among other things, remote switching modules).

<sup>17</sup> *See* BellSouth Comments at 5.

<sup>18</sup> *See, e.g.*, ATG Comments at 3; AT&T Comments at 22.

as the incumbents, and would be discriminatory, unjust, and unreasonable, in violation of section 251(c)(6).

**B. The Commission Should Not Seek To Distinguish Between Single-Function and Multi-Function Equipment.**

CompTel urges the Commission to reject any putative distinctions between single-function and multi-function equipment. So long as a CLEC has established interconnection with the ILEC through its collocation arrangement, the CLEC should be able to collocate any telecommunications equipment that will help maximize its collocation throughput. Modern telecommunications equipment increasingly defies easy categorization as “single” or “multi” functional. In fact, it is the rare piece of equipment that cannot be broken down into several discrete functionalities that are being provided or made available. As a result, the Commission should not try to determine whether certain equipment is single-function or multi-function equipment, but rather enable CLECs to collocate any equipment that will permit them to take maximum advantage of their collocation arrangement.

The comments of several parties support CompTel’s proposal that the Commission permit CLECs to collocate any telecommunications equipment or functionalities within the collocation arrangement where the CLEC has established interconnection with the incumbent LEC. For example, CLECs demonstrate that various types of switching equipment, including “soft switches,” are necessary for them to use their collocation arrangement to provide the services they desire to offer.<sup>20</sup> As McLeod USA explains, “soft-switching functionality separates some line-connection and switching matrix functions, allowing the functionality of the

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<sup>19</sup> Cisco Comments at 7.

<sup>20</sup> *See, e.g.*, Comments of McLeodUSA at 4. *See also* Comments of Tachion Networks, Inc. at 2 (explaining the wide range of functions available in the equipment it develops).

switch to be deployed in physically separate locations.”<sup>21</sup> By virtue of collocating this equipment in the CLEC’s existing interconnection arrangement, CLECs can increase efficiency and throughput. Without the ability to collocate this equipment within their collocation arrangement, CLECs would not be able to maximize the functionality of the equipment, and thus, their throughput would be reduced rather than maximized.

Additionally, in those instances where CLECs already have invested in certain existing equipment, they should have the ability to add new functionalities by collocating additional equipment rather than being forced to replace their existing equipment with multi-function equipment. Of course, over time CLECs certainly would seek to replace the single function equipment with more advanced equipment when it is economically, financially and technically appropriate to do so. Until that time arrives, however, the Commission should give CLECs maximum flexibility to determine which telecommunications equipment they need to collocate in order to maximize their collocation throughput.

**C. The Collocation Throughput Approach Supports the Use of Cross-Connects.**

As CompTel stated in its comments, without cross-connects, CLECs would be unable to share each other’s resources, and instead, they would have to perform all of the necessary functions themselves within their own collocation arrangements. This would create an economically inefficient and supra-optimal demand for scarce ILEC central office collocation space.<sup>22</sup> The Commission should reject ILEC arguments seeking to prohibit cross-connects between collocated carriers. If CLECs are permitted to engage in cross-connects, CLECs already collocated within the incumbent LEC central office would have the ability to connect to

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<sup>21</sup> *Id.*

a functionality that one CLEC might have that another CLEC does not have (but nonetheless could lawfully acquire by placing additional equipment at the expense of the property of the incumbent LEC). This will enable CLECs to take advantage of capacity and capabilities of other CLECs' equipment, and in turn, will reduce the demand for space in the incumbent LEC central office.

Similarly, though the Commission did not address this issue in the *Collocation Order*, the Commission should allow those CLECs that are "virtually" collocated, either through an actual virtual collocation arrangement or, *de facto*, through the purchase of all of the ILEC network elements (e.g., UNE-P), to cross-connect to the collocation arrangement of another CLEC. Such a rule would serve to minimize CLEC dependence on ILEC UNEs, thus only using those ILEC network functionalities that essentially are "necessary" for a CLEC to be able to provide the services it seeks to offer.

## **II. COMPTTEL SUPPORTS THE ADOPTION OF A BROADBAND UNE.**

Pursuant to the *UNE Remand Order*, incumbent LECs are required to provide requesting carriers with access to unbundled packet switching in some situations where the incumbent LEC has placed its DSLAM in a remote terminal.<sup>23</sup> CompTel requests that the Commission shore up the loose ends of this requirement by clarifying that the incumbent LEC must provide requesting carriers with access to unbundled packet switching in any instance where the splitting is conducted remotely, whether at a remote terminal or otherwise.

Incumbent LECs must be required to offer packet-switching as a UNE to those CLECs that are unable to collocate in the remote terminal. Access to packet-switching as a UNE

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<sup>22</sup> CompTel Comments at 10.

would enable CLECs to take advantage of the full functions remotely placed. Without such access, however, CLECs would be impaired as they would be forced to submit to a less efficient and inferior network configuration.

With regard to the deployment of next generation digital loop carrier (“NGDLC”) systems, a CLEC does not obtain collocation for its equipment on the same terms and conditions that apply to the ILEC’s own DSLAM, unless the CLEC actually collocates within the remote terminal *and* is able to access all of the subloops served by that remote terminal from the remote terminal. In the case of SBC’s Project Pronto, by using splice points rather than cross-connect panels, SBC has ensured that no carrier can collocate efficiently in the remote terminal. The CLECs unable to collocate in the remote terminal are at a material disadvantage to the incumbent LEC. Therefore, the Commission should require all ILECs to offer the same broadband service that SBC has been required to offer, and to do so as a UNE combination subject to Section 251(c)(3).

CompTel further supports those comments arguing that, for the loop, subloop, and the NGDLC, CLECs must be able to have access to the full features and functionalities, which could be purchased as a UNE combination.<sup>24</sup> Specifically, CLECs must have access to all of the features and functionalities of NGDLC systems as individual UNEs. Access to all features and functionalities includes all technically feasible transmission speeds and QoS classes, such as Constant Bit Rate and real time and non-real time Variable Bit Rate that exist in the attached electronics of the loop.<sup>25</sup> As the Joint Commenters noted, it is irrelevant whether the incumbent LEC is not itself using certain features, functions and capabilities within the broadly defined

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<sup>23</sup> *UNE Remand Order* at para. 313.

<sup>24</sup> *See, e.g.*, Joint Commenters at 64; Comments of IP Communications Corporation at 9.

<sup>25</sup> *See, e.g.*, Comments of IP Communications Corporation at 9.

subloop.<sup>26</sup> The incumbent LEC has the ability to use the features if it desires; CLECs merely seek that same capability.

Without full access to these features and functionalities, CLECs would be unable to address those customers who are served off of the “new network” configuration from the central office. It would be extremely unfair if a CLEC’s collocated equipment were to be subject to “stranding” or premature obsolescence simply because an ILEC has chosen to deploy a different network architecture. Thus, a “workaround” is necessary in the form of all of the elements used for either voice or data services from the central office to the customer premises in an already combined manner accessible from existing CLEC collocation arrangements.

### **III. CLECS SHOULD HAVE ACCESS TO UNBUNDLED WAVELENGTHS.**

CLECs should have access to unbundled optical wavelength capacity. It is critical for CLECs to have the opportunity to distinguish themselves from the ILECs by, *inter alia*, having full access to the features, functions, and capabilities of the network. Already many CLECs offer a wide variety of products and services to satisfy individual customer needs that might not be available through the ILEC simply because the ILEC either has chosen not to use all of the capabilities of its network, or has configured its use of the network to optimize service to a particular class of customers. For example, an ILEC might want to serve large numbers of customers that require only a faster download speed than they currently receive. In comparison, a CLEC may want to serve a smaller number of customers that have higher bandwidth needs.

Purchasing a dedicated amount of bandwidth would enable a carrier to offer services that it would be unable to otherwise offer. In particular, by purchasing a dedicated

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<sup>26</sup> Joint Commenters at 62.



amount of bandwidth called a “virtual private path,” a CLEC could offer guaranteed minimum bit rate services to its customers. Many business customers demand a guaranteed level of bit rate capacity. A CLEC would be able to offer these services with a private virtual path. Similarly, even if only the UBR class of service were to be available, a CLEC still would be able to distinguish its service offering by providing a different rate of oversubscription to its customers than the ILEC offers. Without access to a virtual private path, CLECs would be unable to offer “business class,” that is, guaranteed minimum bit rate, data services. Thus, if a CLEC wants to be able to offer service to all prospective business customers, it must be able to purchase a dedicated amount of bandwidth, so that it could provide guaranteed service levels.

### CONCLUSION

For the foregoing reasons, the Commission should require CLECs to collocate multi-function equipment and to engage in CLEC-to-CLEC cross-connections. The Commission also should adopt a broadband UNE and permit CLECs access to unbundled wavelengths of the local loop.

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List A B C D E

## TABLE OF CONTENT

	<u>Page</u>
SUMMARY .....	ii
I. INTRODUCTION.....	1
II. NEITHER SECTION 251(b)(4) NOR SECTION 224 GRANT PETITIONERs AN INDEPENDENT RIGHT OF ACCESS TO ILECs' COs.....	3
III. PETITIONERs CANNOT OBTAIN THE FULL RELIEF THAT THEY REQUEST WITHOUT AN IMPERMISSBLY BROAD RE-DEFINITION OF THE STATUTORY TERMS "CONDUIT," "DUCT" AND "RIGHT-OF-WAY".....	7
IV. COLLOCATORs HAVE THE RIGHT TO DIRECTLY INTERCONNECT WITH AND OBTAIN TRANSPORT FACILITIES FROM THE PROVIDER OF THEIR CHOICE .....	10
V. VERIZON's CATT SERVICE IS A REASONABLE AND FEASIBLE MEANS OF ALLOWING CFPs TO EFFICIENTLY SERVE COLLOCATORS .....	12
VI. TELECOMMUNICATIONs CARRIERs HAVE A RIGHT OF ACCESS TO MANHOLE ZERO UNDER SECTION 224(f)(1).....	13
VII. CONCLUSION .....	15

## SUMMARY

The Commission should decline to expand the scope of Sections 224(f)(1) and 251(b)(4) as petitioners request. As both a CLEC and a competitive provider of local transport, Qwest shares many of the petitioners' concerns regarding their ability to interconnect with collocators in ILEC COs. Qwest's own experience as a CLEC demonstrates that alternative sources of fiber transport can promote market entry and help overcome obstacles that might otherwise delay the availability of new competitive services to consumers. On the other hand, as a major ILEC, Qwest will suffer significant harm if the Commission follows the petitioners' proposed course of action. Thus, Qwest is in the position of having to balance the need and desire of a CLEC and a CFP for access to collocation space in ILECs' COs and the totally lawful desire of an ILEC to control the use of its own private property.

While the Petition may have "pro-competitive" attributes, it is neither legally sound nor in the public interest and should be rejected by the Commission. Not only do petitioners urge the Commission to enter into perilous constitutional waters by dramatically expanding the scope of ILEC property that is subject to taking under Section 224, but they also ask the Commission to find a new collocation right that would extend collocation obligations to all ILECs, not just to ILECs. Furthermore, the Commission does not need to adopt petitioners' legal position to accommodate the needs of CFPs to interconnect with collocators in ILECs' COs.

There is only one provision of the Act, Section 251(c)(6), that allows other telecommunications carriers a right to occupy space in ILECs' COs. Neither Section 224 nor Section 251(b) address rights of access to the CO itself; these Sections can only be read to address telecommunications carriers' rights of access to poles, conduits, and rights-of-way running through other property. As with any other statutory provision authorizing the taking of

private property, the Commission must narrowly construe this statutory scheme to limit the extent to which the property of ILECs will be subject to physical occupation. Clearly, what petitioners ask for in this proceeding is a broad expansion of the Commission's authority to take private property that cannot be reconciled with the Court's holdings in *GTE* and *Bell Atlantic*.

Any rights that a CFP may have to access collocation space in an ILEC CO flow from Section 251(c)(6) and the rules that the Commission has promulgated in implementing this statutory provision. As such, a CFP has a right to bring its fiber into an ILEC CO if it is also a CLEC and has leased collocation space or if a collocator has entered into an agreement to lease facilities from the CFP. The ILEC may not unduly restrict collocators in their choice of transport providers by requiring CFPs to comply with unnecessary and uneconomically burdensome procedures or methods for gaining access to collocation space.

CFPs may be leasing facilities to numerous collocators in a single ILEC CO. In such cases, it is in the interest of both CFPs and the ILECs to allow CFPs to interconnect with collocating carriers in the most efficient manner. Verizon's CATT service appears to be an efficient means of allowing CFPs to serve multiple collocators in a single CO. If services similar to CATT were made available to CFPs by other ILECs, the process of serving multiple collocators would be simplified for both CFPs and ILECs.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Coalition of Competitive Fiber	)	
Providers' Petition for Declaratory	)	
Ruling Concerning Application of	)	CC Docket No. 01-77
Sections 251(b)(4) and 224(f)(1) of	)	
the Communications Act of 1934, as	)	
amended, to Central Office Facilities	)	
of Incumbent Local Exchange Carriers	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest"), through counsel and pursuant to the Federal Communications Commission's ("Commission") *Public Notice* ("Notice"),<sup>1</sup> hereby submits its comments on the Petition for Declaratory Ruling ("Petition") filed by the Coalition of Competitive Fiber Providers (or "petitioners").<sup>2</sup>

I. INTRODUCTION

In their Petition, the Competitive Fiber Providers ask the Commission to adopt an overly-broad interpretation of the access requirements imposed on all local exchange carriers ("LEC") by Sections 251(b)(4) and 224 of the Communications Act.<sup>3</sup> As both a competitive LEC ("CLEC") and a competitive provider of local transport, Qwest shares many of the concerns of competitive fiber providers (or "CFPs") regarding their ability to interconnect with collocators in

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<sup>1</sup> *Public Notice, Pleading Cycle Established for Comments on Petition of Coalition of Competitive Fiber Providers for Declaratory Ruling of Sections 251(b)(4) and 224(f)(1)*, CC Docket No. 01-77, DA 01-728, rel. Mar. 22, 2001.

<sup>2</sup> Petition for Declaratory Ruling filed Mar. 15, 2001.

<sup>3</sup> 47 U.S.C. § 251(b)(4); 47 U.S.C. § 224(f)(1).

incumbent LEC ("ILEC") central offices ("CO"). Qwest's own experience as a CLEC demonstrates that alternative sources of fiber transport can promote market entry and help overcome obstacles that might otherwise delay the availability of new competitive services to consumers.<sup>4</sup> Qwest has used the facilities of other competitive fiber providers in many out-of-region locations<sup>5</sup> to extend the reach of its own network.

On the other hand, as a major ILEC, Qwest also will suffer significant harm if the Commission follows the petitioners' proposed course of action.<sup>6</sup> Thus, Qwest is in the position of having to balance the need and desire of a CLEC and a CFP for access to collocation space in ILECs' COs and the totally lawful desire of an ILEC to control the use of its own private property. The balancing of these interests within Qwest is very much like the balancing which the Commission faces in determining whether the instant Petition has any merit under either the letter or spirit of the 1996 Act.

Evaluating the Competitive Fiber Providers' Petition from any reasonable perspective leads to one conclusion -- the approach that petitioners advocate is neither legally sound nor in the public interest. Not only do petitioners urge the Commission to enter into perilous constitutional waters by dramatically expanding the scope of LEC property that is subject to

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<sup>4</sup> Qwest's ability to easily interconnect with CFPs in COs (in which Qwest is collocated) in Verizon's service area has enabled Qwest to make services available to its customers much earlier than would have otherwise been possible.

<sup>5</sup> The term "out-of-region" refers to the operations of Qwest affiliates that are outside Qwest Corporation's 14-state region where it operates as an ILEC.

<sup>6</sup> On June 30, 2000, Qwest Communications International Inc. merged with U S WEST, Inc. With this merger Qwest, which already was a large interexchange carrier ("IXC") and CLEC, acquired U S WEST Communications, Inc. (later renamed Qwest Corporation), a Bell Operating Company and ILEC. The resulting merged entity is fairly unique in that Qwest is now a major ILEC, IXC, CLEC, and a CFP (as petitioners use the term).

taking under Section 224,<sup>7</sup> but they also ask the Commission to find a new collocation right that would extend collocation obligations to all LECs (and possibly to all utilities subject to Section 224), not just to ILECs as is the case under Section 251(c)(6). The Commission should reject petitioners' request. It is not necessary to follow this course of action to accommodate the needs of CFPs to interconnect with collocators in ILECs' COs.

Qwest is of the opinion that reiteration, or possibly clarification, of the Commission's existing collocation rules is sufficient to make clear that CFPs can directly connect to CLECs collocated in ILECs' COs. In the comments that follow, we address both the legal foundation of the Competitive Fiber Providers' Petition and their business objective of interconnecting with collocated CLECs in an efficient manner.

II. NEITHER SECTION 251(b)(4) NOR SECTION 224 GRANT PETITIONERS AN INDEPENDENT RIGHT OF ACCESS TO ILECs' COs

Petitioners ask the Commission to find that Sections 251(b)(4) and 224(f)(1) give CFPs (who are not already collocated) a right of access to install their fiber and associated equipment (*e.g.*, connector blocks and distribution frames) in ILECs' COs. Petitioners assert that this right is independent of any collocation rights that they might have under Section 251(c)(6) of the Act. Petitioners contend that the Commission should address the issues raised in its Petition because there is "both a controversy and uncertainty" concerning the rights of CFPs under Sections 251(b)(4) and 224(f)(1). Petitioners' arguments should be rejected as contrary to clear language of the Act.

Prior to the Competitive Fiber Providers' Petition, Qwest was not aware that there was any controversy as to the legal basis for gaining access to ILECs' COs. There is only one provision of the Act -- Section 251(c)(6), the Act's collocation provision -- that allows other

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<sup>7</sup> *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000).



telecommunications carriers a right to occupy space in ILECs' COs.<sup>8</sup> Petitioners' attempt to create a new legal right out of thin air by cobbling together Sections 251(b)(4) and 224 does not withstand legal scrutiny. Section 251(c)(6) is the only provision of the Communications Act that specifically addresses the scope of competing carriers' rights of access to "the premises of the local exchange carrier" for collocation purposes. Congress carefully delimited the scope of those rights, largely to "avoid an unnecessary taking of private property."<sup>9</sup>

Neither Section 224 nor Section 251(b) addresses rights of access to the CO itself; the more general provisions of these Sections can only be read to address rights of access to poles, conduits, and rights-of-way running through other property. Any broader construction of those provisions would violate both (1) the long-standing principle of statutory interpretation which requires that more specific provisions take precedence over the more general provisions and (2) the rule (reaffirmed in both *GTE* and *Bell Atlantic*) against broadly interpreting generally-worded federal statutes to authorize unnecessary takings of private property. Indeed, the petitioners seek the same broad relief that the Court found to be unlawful under Section 251(c)(6) in *GTE*.

Petitioners' statutory argument is barred by the plain meaning of the statutory text. What petitioners seek is collocation by another name. Section 251(c)(6) both creates specific rights of physical collocation and carefully limits their scope. Those limits reflect a deliberate congressional policy choice that the Commission is bound to respect. But, even apart from those considerations, constitutional concerns *independently* require the Commission to reject the Petition. As with any other statutory provision authorizing the taking of private property, the

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<sup>8</sup> Section 251(c)(6) is an explicit congressional authorization allowing CLECs to collocate in ILECs' COs.

<sup>9</sup> See *GTE v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000); see also *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994).

Commission must narrowly construe this statutory scheme to limit the extent to which the property of ILECs and other LECs will be subject to physical occupation.

In *Bell Atlantic*,<sup>10</sup> the D.C. Circuit rejected the Commission's attempt (in its *Expanded Interconnection* proceeding) to create rights of physical collocation without express statutory authorization.<sup>11</sup> The Court arrived at that holding *not* because the Communications Act itself precluded the Commission's recognition of such rights -- the statute was in fact silent or ambiguous on that point -- but because the Commission lacks authority to resolve statutory ambiguities to expand rights of physical access to private property. The Court reasoned that a "narrowing construction" of statutory access rights is required whenever "administrative interpretation" would otherwise create "an identifiable class of cases in which application of a statute will necessarily constitute a taking" of private property.<sup>12</sup> Any other approach, the Court explained, would inappropriately permit administrative agencies to use "statutory silence or ambiguity to expose the Treasury to liability both massive and unforeseen."<sup>13</sup>

Six years after passage of the 1996 Act, in *GTE v. FCC*,<sup>14</sup> the D.C. Circuit reaffirmed the same point. In the 1996 Act, Congress created an explicit right of physical collocation in ILECs' COs, but it limited the scope of that right to collocation that is "necessary" for interconnection or

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<sup>10</sup> *Bell Atlantic*, 24 F.3d at 1445-46.

<sup>11</sup> In *Bell Atlantic* the Commission argued that taking authority need not be express but could be implied. The Court rejected this argument finding that such an implication could only be made as a matter of necessity ("where 'the grant [of authority] itself would be defeated unless [takings] power were implied,'" *Id.* at 1446, citing *Western Union Tel. Co. v. Pennsylvania R.R.*, 120 F. 362, 373; *affd.* 195 U. S. 540).

<sup>12</sup> *Id.* at 1445 citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

<sup>13</sup> *Id.*

<sup>14</sup> See note 9 *supra*.

access to network elements.<sup>15</sup> The Commission interpreted the new collocation rights broadly, and the D.C. Circuit again repudiated the Commission's approach. The Court reasoned, as it had in *Bell Atlantic*, that statutory provisions invoked to support collocation rights must be carefully construed to avoid any "unnecessary taking of private property."<sup>16</sup>

Clearly, what petitioners ask for in this proceeding is a broad expansion of the Commission's authority to take LECs' private property that cannot be reconciled with the Court's holdings in *GTE* and *Bell Atlantic*. With respect to the issue at hand -- whether Sections 251(b)(4) and 224 provide a right for occupation of LECs' COs -- Congress has remained silent. As such, the Commission may not lawfully find such a right through implication, particularly when it would entail a broad expansion in the Commission's takings authority to all LECs, not just ILECs (as is the case with Section 251(c)(6)).

The basic lesson of both *Bell Atlantic* and *GTE* is that the Commission may place Treasury funds at risk for just compensation awards *only to the extent that Congress has unambiguously authorized it to do so*. In both cases, the Commission erred by creating rights of physical occupation that Congress had not expressly authorized. The Commission would make the same fatal mistake here if it were to grant the instant Petition. What petitioners seek are rights of "exclusive physical occupation"<sup>17</sup> beyond the carefully delimited collocation rights that Congress delineated in Section 251(c)(6). The statute plainly precludes granting petitioners those extra rights.<sup>18</sup> And here, as in *Bell Atlantic* and *GTE*, the Commission must follow a

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<sup>15</sup> 47 U.S.C. § 251(c)(6).

<sup>16</sup> *GTE*, 205 F.3d at 423 (emphasis in original); *see also id.* at 421.

<sup>17</sup> *Bell Atlantic*, 24 F.3d at 1446.

<sup>18</sup> But even if it did not, the best that can be said for petitioners' position is that the statute as a whole -- including Sections 224, 251(b)(4), and 251(c)(6) -- does not clearly support it.

narrow construction of its statutory authority to expose the Treasury to claims for just compensation under the Tucker Act.

Finally, there is no basis for arguing that the constitutional concerns expressed in *Bell Atlantic* are absent because ILECs “will obtain compensation *from the [competing carrier]* for the reasonable costs of co-location.”<sup>19</sup> The same argument was raised, and rejected, in *Bell Atlantic* itself.<sup>20</sup> As the D.C. Circuit there explained, “the LECs would still have a Tucker Act remedy for any difference” between what they ultimately receive from those competing carriers “and the level of compensation mandated by the Fifth Amendment.”<sup>21</sup> That shortfall could arise in any number of circumstances: it could arise, for example, if the compensation amount ordered by regulators is found to fall short of the constitutionally-prescribed level, or if a competing carrier becomes insolvent before it pays any amount at all to the incumbent whose property has been taken. In any event, D.C. Circuit precedent on this point is clear: even where collocation is accompanied by regulatory compensation, the Commission may not grant rights of physical access to the COs in contexts where Congress has left any doubt about its authority to do so. As such, petitioners’ request for a declaratory ruling must be denied.

**III. PETITIONERS CANNOT OBTAIN THE FULL RELIEF THAT THEY REQUEST WITHOUT AN IMPERMISSIBLY BROAD RE-DEFINITION OF THE STATUTORY TERMS “CONDUIT,” “DUCT” AND “RIGHT-OF-WAY”**

Assuming *arguendo* that Sections 251(b)(4) and 224 grant a right of access to LECs’ COs, petitioners still could not obtain the relief that they seek without an impermissibly broad construction of such statutory terms as “conduit,” “duct” and “right-of-way”. Petitioners acknowledge that Commission regulations define “conduit” as “a structure containing one or

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<sup>19</sup> *Bell Atlantic*, 24 F.3d at 1445 n.3.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*